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Disciplinary Discharges—Restricting the Commander's Discretion

By RUSSELL N. FAIRBANKS*

ENLISTED men and women in the United States Armed Forces seldom just fade away. Many die, retire or are relieved from active duty. The majority are discharged from the service either administratively¹ or by court-martial.²

Even though courts-martial and the administrative discharge process frequently accomplish the same results, many commentators and almost all judge advocates view the two as distinct procedures. The great sentencing power of courts-martial make them seem a different genus than an administrative body which can neither fine, nor sentence, nor kill, but can only discharge from the service. The judge advocates are comforted by the governance of courts-martial by an act of Congress. The administrative discharge machinery remains independent. Finally, the procedural safeguards which surround the accused in a court-martial are so much greater than those afforded the respondent in an administrative proceeding that many military lawyers are a bit uneasy with the latter. Nonetheless, both frequently involve the same fundamental question: How does a commanding officer rid himself of unwanted personnel?

Further, the ex-G.I. with the funny discharge (any discharge other than an honorable discharge) may not fully appreciate the analytical usefulness of the dichotomy between administrative and court martial discharges. The results are often the same. One lasts as long as the other—a lifetime.

Admittedly this approach is oriented from the soldier's viewpoint, rather than the military's. It deals with the practical consequences of a discharge rather than the traditional compartmentalization of military

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1. 32 C.F.R. §§ 41.1-10 (1970) prescribe the policies, standards, and procedures of the Department of Defense governing the administrative discharge of enlisted men and women.

2. The Uniform Code of Military Justice, last amended in 1969, and the Manual for Courts-Martial, United States, 1969, prescribe military justice for all of the armed forces.

law as a whole. But this is only reasonable. The ex-G.I. with the funny discharge cannot be expected to appreciate the analytical usefulness of such a difference in procedure when the result is so obviously the same. One lasts as long as the other, and at least in one significant aspect (civilian employment) the impact may be as great. In any event who, if anyone, ever listens to the tortured explanation of an ex-G.I. trying to explain why he did not measure up to an honorable discharge?

Whether or not the distinction between judicial and administrative discharges is useful to the judge advocates, the discharge itself has a sufficiently enduring quality both in origin and result to justify linking the two together. The procedure in each case begins with the command determination to discharge the soldier and it ends with a discharge. The procedure in the middle is the subject of this paper. It will appear that both the judicial and administrative procedures are imperfect solutions to the same problem—although the judicial procedure is perhaps not as distressing as the administrative one.

I. The Discharge as a Problem

The number of service people affected by judicial or administrative discharges is substantial. In 1965 the military departments separated 713,337 of their members.³ The overwhelming bulk of those, 671,512, received honorable discharges; but 41,825 did not.⁴ They received one of four that carry connotations of less than honorable service. While the number of "stigmatized discharges" by administrative action was more than ten times as great as that by courts-martial,⁵ the potential of the latter is not insubstantial. Fiscal year 1969 saw 81,375 general and special courts-martial convened,⁶ although few of them, probably not more than 6,522,⁷ were actually authorized to award punitive discharges. But if a greater reliance on court-martial dis-

3. See *Joint Hearings on S. 745 through S. 762, S. 2906, and S. 2906, Bills to Improve the Administration of Justice in the Armed Services, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess., pt. 3, at 1001, 1005, 1035, 1045 (1966) [hereinafter cited as *1966 Hearings*]. The figure 713,337 does not include Coast Guard discharges and includes retirements only from the Navy.

4. See *id.* The figure 671,512 includes retirements only from the Navy.

5. See *id.* The ratio is actually 38,792 to 3,033.

6. See 1969 ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 17, 27, 34, 40 [hereinafter cited as 1969 REPORT].

7. This figure includes the general courts-martial of all the departments, and the "special court-martial involving BCD" of the Navy. *Id.*

charges was desired, all the services need do to empower their special courts-martial (74,853 in 1969)⁸ to award bad conduct discharges is: (1) provide the accused with qualified counsel, (2) keep a verbatim record of the proceedings, and (3) detail a military judge to the trial.⁹

A. The Choice of Procedure

In actual practice the decision whether to use courts-martial or administrative boards to dispose of unwanted personnel depends on a number of factors. First, of course, the serviceman's conduct must offend the punitive articles of the Uniform Code of Military Justice to make him eligible for a court-martial. Once this hurdle is passed, the command considers a number of factors including: (a) the soldier's past conduct; (b) the seriousness of his offense; (c) the effectiveness of the soldier's representation; and of course (d) how good a case can be made out against the soldier. Prejudice and compassion are also factors, familiar to experienced prosecuting agencies, in the evaluation leading to the decision of how best to treat the offender. One factor that weighs heavily is the service's analysis of the relative inconvenience of courts-martial on the one hand and administrative separation on the other. How burdensome will be the assignment of qualified counsel, the provision of a military judge, and the taking of a verbatim record in a special courts-martial which will try a man who might just as well be administratively separated?

B. The Choice of Discharge

Closely related to the question of whether to use a court-martial or an administrative board is the question of which discharge? The five possibilities fall into two categories, honorable discharges and all others. Yet there are significant distinctions among all five.

As would be expected, an honorable discharge is a "separation from the service with honor."¹⁰ A general discharge is very similar but it is something less, *i.e.*, a "separation from the service under honorable conditions issued to an individual . . . whose military record is not sufficiently meritorious to warrant an honorable discharge."¹¹ Both are given by administrative action,¹² and both entitle the discharged service-

8. *Id.*

9. UCMJ art. 19, 10 U.S.C. § 819 (Supp. V, 1970).

10. 32 C.F.R. § 730.2(a) (1970).

11. *Id.* § 730.2(b).

12. *Id.* § 730.1(c).

man to the full set of veterans and other benefits available from the federal government.¹³

Unlike an honorable or general discharge, an undesirable discharge, "an administrative separation from the service under conditions other than honorable . . . issued for unfitness, misconduct, or security reasons,"¹⁴ qualifies its holder for some benefits, disqualifies him for others, and leaves uncertain his eligibility for many benefits administered by federal agencies other than the military departments.¹⁵ One receiving an undesirable discharge is, for instance, said by the Department of the Army not to be eligible for payment of accrued leave, transportation of his dependents from his last domestic station to his home, burial in a national cemetery, civil service preference or retirement credit, and his entitlement to those benefits set by the Veterans Administration is said to be determined by that agency.¹⁶

A bad conduct discharge, like an undesirable discharge, is "a separation from the service under conditions other than honorable."¹⁷ It may be awarded only by the approved sentence of a general or special court-martial.¹⁸ Very few benefits are within the grasp of the serviceman holding a bad conduct discharge. If he holds a dishonorable discharge "by its own connotation . . . a separation from the service under dishonorable conditions",¹⁹ which may be given only by the approved sentence of a court-martial,²⁰ he may receive only two of the 36 listed benefits.²¹

With apparent symmetry then, a discharged serviceman's eligibility for benefits varies directly with the quality of his discharge, honorable and general discharges being surface equivalents. But this equivalence is not total. A general discharge may be given for conduct which many members of the civilian community, particularly employers, would find abhorrent in a prospective employee. The Department of Defense regulations authorize its issue to alcoholics,²² homosexuals,²³ those pos-

13. See Benefits-Discharges Table, Dep't of the Army GTA 21-2-1, June 1969.

14. 32 C.F.R. § 730.2(c) (1970) (emphasis added).

15. See note 13 *supra*.

16. *Id.*

17. 32 C.F.R. § 730.2(d) (1970).

18. *Id.*

19. *Id.* § 730.2(e).

20. *Id.*

21. See note 13 *supra*.

22. 32 C.F.R. § 41.6(g)(5) (1970).

23. *Id.* § 41.6(g)(6).

sessed of character and behavior disorders,²⁴ sexual perverts,²⁵ and to those convicted by civil authorities of grave offenses.²⁶

A general discharge is also appropriate for conduct which, I expect, would be viewed by a prospective employer as somewhat less serious. Bed wetting,²⁷ a service record which does not quite measure up,²⁸ unhandiness,²⁹ or failure to pay alimony³⁰ are not as likely to rouse the same degree of distrust and revulsion as sexual perversion. But imagine the plight of the veteran attempting to explain to a prospective employer that he got his general discharge for merely shirking his duties³¹ rather than some other form of onerous conduct for which a general discharge might have been issued.

It is true, of course, that an honorable discharge may also be granted to one who has been found unwanted for any of the reasons specified above. For example, a homosexual may receive an honorable or a general discharge "as warranted by the individual's military record,"³² and a sodomist who would normally find himself with an undesirable discharge may up-grade his discharge if "the particular circumstances in a given case warrant a General or Honorable Discharge."³³ But the embarrassment which faces the holder of a general discharge seems not to confront the honorably discharged soldier. My own highly unscientific and too-limited investigation leads me to believe that friends, relatives, enemies, and prospective employers seldom seek to go behind an honorable discharge to find out why its holder really left the service. On the other hand, general discharges, although the surface equivalent of an honorable discharge, arouse deep suspicions about the quality of the soldier's military career.³⁴

24. *Id.* § 41.6(g)(2).

25. *Id.* § 41.6(i)(2).

26. *Id.* § 41.6(j)(1).

27. *Id.* § 41.6(g)(4).

28. *See id.* § 41.6(i)(4). Navy Regulations provide that the issuance of an honorable discharge is conditioned upon "[p]roper military behavior and proficient, industrious performance of duty having due regard to the rate held and the capabilities of the individual concerned." *Id.* § 730.2(a)(2).

29. *Id.* § 41.6(g)(1).

30. *Id.* § 41.6(i)(6).

31. *Id.* § 41.6(i)(1).

32. *Id.* § 41.6(g).

33. *Id.* § 41.6(i).

34. This anomaly arises in part because the regulations attempt to equate apples with pears. Unsuitability, a characterization that may result in a general discharge, is occasioned by inaptitude, character or behavior disorders, apathy, defective attitudes, inability to expend effort constructively, enuresis, alcoholism, homosexual or other aberrant tendencies, or financial irresponsibility. *Id.* §§ 41.6(g)(1)-(7). This "un-

II. The Problem with Discipline

Common wisdom has it that how the military treats its allegedly badly behaved members may, and perhaps should, be more summary and less protective than the way the civilian community deals with its aberrant members. In *Toth v. Quarles*,³⁵ the court said:

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III Courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike Courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. *But trial of soldiers to maintain discipline is merely incidental* to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that *military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts*. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trial. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made towards making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.³⁶

And 14 years later in *O'Callahan v. Parker*³⁷ the Supreme Court reemphasized the *Toth* finding and added

A court martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.³⁸

With what others might regard as an excess of enthusiasm the Court continued:

suitability," which seems to be determined by how bothersome the service person is to his command, is not the same as a discriminating evaluation of the quality of his conduct. Since the standards are different, how can the two be equivalent? An admirable allowance for special cases, and perhaps for the exercise of compassion, unhappily contribute to the anomaly. That is, one who can be discharged for misconduct, which usually ends in an undesirable discharge, may receive a general discharge in extraordinary cases. *Id.* § 41.6(j).

35. 350 U.S. 11 (1955).

36. *Id.* at 17 (emphasis added).

37. 395 U.S. 258 (1969).

38. *Id.* at 265.

None of the travesties of justice perpetrated under the UCMJ is really very surprising for military law has always been and continues to be primarily an instrument of discipline, not justice. Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969).³⁹

Professor Joseph W. Bishop, Jr., a strong defender of the military, says that the first reason for the existence of a separate system of military justice is "the need for swift and summary machinery for the maintenance of discipline."⁴⁰ His opinion finds support in the Mutiny Act of 1689, where was urged the necessity that "an exact Discipline be observed And that Soldiers who shall Mutiny or stirr up Sedition or shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Law will allow."⁴¹ The traditional notion that nonconforming soldiers cannot safely be accorded the same judicial safeguards as are their civilian brothers, whether by a court or by an administrative board, may be right, but it insufficiently takes into account modern speculation about what makes an army work.

Substantially, the question here is whether a comparatively rough and ready system of military justice is the underpinning of military discipline, and thus a major contributor to the efficiency of a fighting force. Only remarkable faith in the utility of coercive power could answer this affirmatively. Those who have exercised such power, and some observers of its exercise, have recognized its limitations. Thus President Truman assumed that some of his successor's orders would be disobeyed.⁴²

39. *Id.* at 266. These passages seem more angry than thoughtful. If military law is primarily an instrument of discipline, and the enthymeme is that discipline is essential to an effective fighting force, is not the conclusion that the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function" a bit overdrawn? Given the astonishingly high American army ratio of support to combat soldiers, is not the Court's assignment of "incidental" to this particular function a venturesome intrusion into the area of allocation of human resources within the military? Why cannot military tribunals be constituted to give at least a workable approximation of the qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts?

40. Bishop, *Military Law*, in 10 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 312 (D. Sills ed. 1968).

41. An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service, 1 W. & M., c. 5 (1689).

42. Referring to General Eisenhower in a campaign speech, given Sept. 30, 1952, President Truman said: "Now I wouldn't count on their candidate for President to make them behave. You see, he is a military man. He has been in the army ever since he was eighteen years old. He has been in the habit of saying, 'You do this.' And it's done. 'You do that.' And it's done. He doesn't understand that the office of President of the United States is a public relations office, and the President spends most of his time persuading people to do what they ought to do without being per-

Mr. Roger W. Little, then with the Office of Military Psychology and Leadership at the United States Military Academy, lived with a rifle company in Korea from November 1952 through February 1953. In his professional capacity he observed the technical aspects of combat operations, and wrote:

The chain of command is, however, a deceptively simple scheme of the operation of the company. Division of all members into two status groups, and the distribution of rank corresponding to position held, tended to reinforce the chain of command. Increasing the risk to which all members of the company were exposed weakened the chain of command.

The battlefield situation was the prototype relationship between officers and enlisted men throughout military organization. Dominating all else was the probability that in a combat event and as a result of the officer's command, some members of the formation would be killed or wounded. Second, in the intensive system of interpersonal relationships existing among those who moved out in the attack, was a potential for collective defiance of the task demanded by the organization. Third, there was the problem of adequate reward for those who conformed and moved forward in the assault. Survival, the greatest reward, was a chance of the situation rather than something to be dispensed by the commander. The organization could offer nothing more than symbols of compliance in the form of decorations for valor.

The platoon leader occupied the lowest position of all officers in the chain of command. As the degree of risk increased, the intensity and frequency of the platoon leader's interaction with enlisted men increased, and correspondingly, significant interaction with status peers decreased. The more he participated in their activities, the more he tended to share the sentiments of the men he commanded, and his willingness to use the sanctions available to him diminished correspondingly.

Yet the situations in which his authority was required were more crucial than those encountered by commanders at higher echelons. First, the chances were greater that the men he commanded would deviate from his orders because the risks of compliance were greater. Second, he was intimately associated with the men he commanded. Third, the sanctions at his disposal were of no immediate value if defiance occurred in the assault. The rifleman who refused to advance could only be punished by repeated threats of sanctions to be imposed when the battle was over.

Besides these problems in using authority, the commander had to make punishment appear more unpleasant than the risks of combat. For a rifleman, tried by a Summary or Special Court Martial, only a fine would have been a penalty. If there was a sentence of confinement, the offender would be transferred to a rear echelon stockade to serve out his sentence, and this would be a re-

ward rather than a penalty. The result was to make sanctions and courts martial more effective in prospect than in deed.

Authority was thus likely to fail if used alone. It worked only because it was supported by "manipulations:" indirect or symbolic acts which induced implicitly the desired behavior. Such acts had the objective of creating a condition of generalized individual compliance with the ideals of the organization. They may have taken the form of an elaborate ritual such as a parade. They may have been as subtle as occasional breaches in the rigid limits of the social order by visits to the sick, or informal welfare inquiries while on formal inspection tours. They might have been as pointed as the presentation of an award for an exceptionally aggressive action, or for a wound incurred in the organization's battle.⁴³

The increasing complexity of the machines of war, and the presence within the military of the larger number of enlisted, civilian, and officer technicians needed to make the machines run require a careful (and cautious) reexamination of command relations at least insofar as they rest on coercion. Professor Kurt Lang concludes:

. . . That technocratically oriented military leaders would emphasize new personnel systems, new management techniques, and new organizational formats is to be expected in a period of rapid technological change. The sheer management of the armed forces is unthinkable without constant innovation in these sectors. Yet these same practices and programs also have disruptive impacts.

The military professional confronted with an unpredictable and uncontrollable external environment has traditionally responded with a drive for internal order and internal consistency. The range of strategic alternatives narrows as the number and destructive power of weapons systems increase; conventional definitions of victory and defeat become ambiguous. The technology of weapons systems requires the most rationally constructed control devices; yet there is a point at which military management can become overconcerned with an ideological effort to impose order and its managerial practices cease to be devices for solving specific organizational problems. This creates a new danger: old-fashioned military rituals can be supplanted by a modernized cult of scientific management.⁴⁴

World War II soldiers were not sure of the causes of behavior and misbehavior. Only 23 percent of the officers and 20 percent of the enlisted men felt that the *best* way to get most soldiers to behave was to punish them every time they did not behave.⁴⁵ Unfortunately, but for the

43. Little, *Buddy Relations and Combat Performance*, in *THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION* 195, 208-09 (M. Janowitz ed. 1964) (footnotes omitted).

44. Lang, *Technology and Career Management in the Military Establishment*, in *THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION* 39, 78 (M. Janowitz ed. 1964).

45. Suchman, Stauffer & DeVinney, *Attitudes Toward Leadership and Social Control*, in *1 STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II* 362, 417 (1949). The

sake of complete clarity, 46 percent of the officers and 67 percent of the enlisted men thought that fear of punishment was the main reason that most soldiers obey.⁴⁶

Research among World War II soldiers led one observer to decide:

The sheer coercive power of Army authority was a factor in combat motivation which must not be forgotten simply because it is easy to take for granted. It was omnipresent, and its existence had been impressed on the soldier from his first days in the Army when he was read the many punitive articles from the Articles of War, each ending with the ominous phrase, "punishable in time of war by death or such other penalty as a court-martial may direct." The Articles of War themselves specify that the punitive articles are to be read to all enlisted men at least every six months. This is only one of the minor ways already examined in earlier chapters in which every enlisted man long before he reached the scene of combat became fully aware of the coercive sanctions which stood back of official commands.

Nevertheless, one not familiar with military justice as exercised in combat commands is likely to take an oversimplified view of the role of naked coercion. Those combat offenses for which the extreme penalty was authorized—desertion, AWOL from the lines (legally equivalent to desertion), and misbehavior in the face of the enemy—were, of course, the ones which involved escape from the combat situation. But practically never was the death penalty actually enforced for purely military offenses. To quote a statement by former Under Secretary of War Robert P. Patterson, after the end of the European fighting: "During the entire length of this war, the Army has executed 102 of its soldiers. All executions but one were for murder or rape. One was for desertion, the first execution for a purely military crime since the Civil War. This man, serving in the European Theater, deserted twice under fire." Generally speaking, then, the death penalty was not used.

Severity of punishment varied greatly from one division to another and in respect to similar offenses within the same division. Sometimes charges were dropped entirely if the soldier would return to combat. In other cases offenders were given six-month terms of hard labor, frequently on roads within range of artillery fire but under no greater danger than many forward service outfits. In still other cases, heavy terms of imprisonment were sentenced, with the offender removed to a stockade or disciplinary training center. Dishonorable discharge was sometimes made mandatory at the end of the term. But the death penalty was not normally considered for a purely military offense. In regard to the heavy prison terms, many men may have thought it likely that the more drastic sentences would be revised in response to public pressure at the end of the war.

data for this work was obtained from the Research Branch, Information and Education Division, United States Army.

46. *Id.*

So the combat man did not in fact face a choice of possible death from the enemy versus certain death if he refused combat. The role of the coercive system must have been of a more complex sort. Aside from the physical unpleasantness of life in a stockade, which was subject to wide variation, the ways in which the coercive formal sanctions could be effective appear to have involved informal factors in addition:

1. Some men expressed in interview the fear of losing pay, family allotments, etc., if they should be convicted by court-martial. Thus family affectional ties became involved.

2. Both family ties and the reactions of a man's buddies were involved in the feeling that being convicted and confined was a disgrace.

3. A man's own established reaction to punishment imposed by established authority might be called up in varying degrees as a sense of shame or guilt.⁴⁷

The importance of the reactions of a man's buddies in inducing conforming behavior, as opposed to coercive discipline, was reaffirmed in Korea. Little found that:

Buddy relationships were the basic element of infantry social organization in the Korean Conflict. As the first major American experience in limited warfare, it has predictive value for future situations in which infantry is employed, for this type of military engagement has unique characteristics which fall most heavily on infantry units. "Limited" warfare implies that the survival of the society is not immediately threatened, and accordingly only a fraction of the available resources, including men, must be committed. Yet ideals must be formulated for which some few men will be willing to make a total sacrifice. With the manpower pool supporting the conflict far exceeding the demand for replacements, there are relatively fewer who must bear the battle, and correspondingly less motivational support from the larger society.⁴⁸

If there is some doubt of the primacy of punishment in the hierarchy of inducements to good behavior, is it clear that whatever punishment is necessary, whether administrative or judicial, must be procedurally and substantively more certain than in the civilian community? Professor Bishop believes so. He says that the members of a court-martial "cannot forget that the prime purpose of military justice must be deterrence, which means the swift and certain suppression of misconduct. The principle that it is better that 99 guilty men go free than that one innocent man be convicted is hard to square with Army discipline. If a soldier who runs away is shot, in Voltaire's expressive phrase, 'pour encourager les autres,' the heartening effect is much diminished if 99

47. Smith, *Combat Motivations Among Ground Troops*, in 2 STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II, 105, 112-13 (1949).

48. Little, *supra* note 43, at 221.

per cent of the deserters go unpunished."⁴⁹

Not all qualified commentators agree. The Ad Hoc Committee to Study the Uniform Code of Military Justice, a group of nine general officers, among whom was the present Chief of Staff of the U.S. Army, William C. Westmoreland, announced that:

Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.⁵⁰

III. The Judicial Process: The Uniform Code of Military Justice

At the same time that the Supreme Court appears to have said that it no longer believes in the probable effectiveness of its only slightly veiled suggestions for the improvement of the Uniform Code,⁵¹ some commentators display remarkable contentment with the kind of justice dispensed the military accused. Professor Bishop "[w]ould not favor radical changes in the system of military justice."⁵² He finds, "That modern military justice is, despite its blemishes, about as fair as the brand of criminal justice dispensed in most of the states. . . ."⁵³

The hope here is that both the Supreme Court and Professor Bishop are wrong, that changes, albeit not what I would term "radical changes," will be proved wise, and will be adopted. The Uniform Code of Military Justice and its most recent amendment, the Military Justice Act of 1968,⁵⁴ both welcome innovations, suggest that Congress will again amend the statute governing military justice, and will amend it well. Judge Ferguson of the Court of Military Appeals thinks, "It's foolish to say either that we cannot improve the Code or that it is totally

49. Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, § 6 (Magazine), at 38, col. 2.

50. Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, *Good Order and Discipline in the Army*, in 1960 ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 1, 12.

51. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955). See text accompanying note 35 *supra*.

52. Bishop, *supra* note 49, at 40, col. 3.

53. *Id.* at 40, col. 3.

54. Pub. L. No. 90-632, 82 Stat. 1335 (1968) (codified at 10 U.S.C. §§ 801-940 (Supp. V., 1970)). For an approving analysis, see Ervin, *The Military Justice Act of 1968*, 5 WAKE FOREST INTRA. L. REV. 223 (1969).

deficient. The truth lies somewhere between. . . ."⁵⁵

A. Independence of the Military Judge

In the Military Justice Act of 1968, Congress elected to furnish a measure of independence to the military judge, the officer who presides, much like a civilian judge, over general courts-martial and, at least in those instances where a discharge is possible, over special courts-martial.⁵⁶ The military judge of a general court-martial is designated by his Judge Advocate General.⁵⁷ Except in most unusual circumstances, the officer who has convened the general court-martial may not "prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge."⁵⁸ That judge is responsible to his Judge Advocate General, who is required to approve his assignment to duties other than those of a general court-martial judge.⁵⁹ But the statute does not provide similar barriers between the military judge of a special court-martial and the displeasure of his non-lawyer superiors. It should.

No doubt the more circumscribed sentencing power of special courts-martial, the burden on the Pentagon which would arise from its closer involvement in the administration of special courts-martial which are much more numerous than are general courts-martial, and perhaps the political realities of one reform at a time all combined to deny the special court-martial judge the limited security assured the general court-martial judge by the 1968 amendment.

Nonetheless Congress concluded that a bad conduct discharge was a serious matter. So serious that before a special court-martial could be authorized to award a bad conduct discharge to an accused, it is required to have a military judge-assigned.⁶⁰ A fortiori, that judge needs no less protection from the same superiors than when he sits on a general court-martial.

Congress has not granted tenure, even of limited duration, to the military judge. His assignment to and away from the military judiciary

55. 1966 *Hearings*, *supra* note 3, at 299.

56. UCMJ arts. 16(1)(A)-(2)(B), 10 U.S.C. §§ 816(1)(A)-(2)(B) (Supp. V, 1970).

57. UCMJ art. 26(c), 10 U.S.C. § 826(c) (Supp. V, 1970).

58. *Id.* The protection would be measurably more effective had the qualifying phrase "relates to his performance of duty as a military judge" been omitted. This possibility, that the convening authority who finds the ruling of a military judge distasteful will also find that judge generally wanting in good military judgment, should have been anticipated and avoided.

59. *Id.*

60. UCMJ art. 19, 10 U.S.C. § 819 (Supp. V, 1970).

is dictated by his Judge Advocate General. Tenure, albeit of uneven extent, is thought to be an essential ingredient of the independence of the state and federal judiciaries, as well as of the Court of Military Appeals.⁶¹ Security of office is equally necessary to buttress the desirable independence of the military judge.

In an analogous situation permanent professors at the United States Military Academy are appointed by the President by and with the consent of the Senate;⁶² they need not retire until age 64;⁶³ and their grade (and thus pay) is fixed.⁶⁴ I suggest that tenure of similar extent be provided by statute for military judges. Such legislation would not completely satisfy the Supreme Court's disquiet about lack of tenure and salary stability, but it would be a step forward in the restoration of that court's confidence in the military justice system.⁶⁵

B. Independence of Defense Counsel

Just as members of the Court of Military Appeals and military judges require for their effective functioning barriers against community displeasure, so do defense counsel. Judge Ferguson has stated, "If the defense counsel, in the best traditions of our bar, ignores the efforts to influence him and stands up and fights for his client, he gets a bad efficiency report which can absolutely ruin his military career. . . . If, on the other hand, counsel is in fact fearful for his career, we will hear nothing about it, for the record will be totally silent in the matter. The dice, therefore, are loaded in favor of the sycophant, and something should and must be done by Congress."⁶⁶ The American Bar Association warns that, "[A] person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers."⁶⁷

Grigory Z. Anashkin, as President of the Criminal Section of the Soviet Supreme Court, has no small segment of sad history to draw from. In words reminiscent of complaints that led to reforms in United

61. Judges of the Court of Military Appeals are appointed to terms of 15 years. UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1) (Supp. V, 1970).

62. 10 U.S.C. § 4333(b) (1964).

63. 10 U.S.C. § 3886 (Supp. V, 1970).

64. 10 U.S.C. § 4336(a) (1964).

65. See text accompanying note 35 *supra*. Judicial tenure for life has gathered some thoughtful critics. See *Hearings on S. 1506 to S. 1516 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

66. 1966 *Hearings*, *supra* note 3, pt. 1, at 302.

67. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5, ETHICAL CONSIDERATIONS para. E.C. 5-23 (1969).

States military justice, he recently stated "that without a defense there cannot be a proper, impartial and objective trial."⁶⁸ He added, "It is enough to remember the events of the past. The most flagrant violations of socialist legality were permitted in cases that were heard without the participation of a defense lawyer."⁶⁹

Lest it be believed that cases of suppression of proper zeal of defense counsel are only of historical interest, Professor Sherman writes:

This summer, however, a former career Army officer, Luther C. West, completed a dissertation for the Doctor of Juridical Science degree at George Washington University Law School entitled "The Command Domination of the Military Judicial Process." This dissertation, as yet unpublished, contains a detailed and documented description of improper command influence in a number of cases of which Mr. West, as an Army officer in the Judge Advocate General's office, had personal knowledge. The accounts make up a startling picture of command intrigue, staff judge advocate compliance, and lower level accession to command wishes. The cases range from intense reprisals against a young military defense counsel, who raised the defense of command influence, to documented proof of false or misleading testimony by three field grade officers in an Article 32 investigation to cover up the role a commanding general had played in incidents leading up to court-martial charges.⁷⁰

The response of Congress to Judge Ferguson's plea to strengthen the independence of defense counsel was sparing. The Military Justice Act of 1968 provides only that "[N]o person . . . may . . . give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, or counsel, represented any accused before a court-martial."⁷¹

This is not enough. No protection is provided against the commander who finds that the "poor" tactics of defense counsel also evidence that man's generally poor performance of military duty. The statute offers no remedy for the covert harassment visited upon the non-conforming. Counsel thought to be overly zealous may discover himself transferred to another post at an inconvenient time; official and personal transactions of his which need the attention of his headquarters are accomplished even more slowly than usual; his duty is altered to his dissatisfaction; and he finds himself no longer among the "in" group.

Indeed, because the statutory insulation about the military judge is perceptibly deeper than that about defense counsel, some commanders

68. N.Y. Times, Jan. 8, 1970, at 3, col. 5 (late city ed.).

69. *Id.*

70. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 59, 90 (1970) [hereinafter cited as Sherman].

71. UCMJ art. 37(b), 10 U.S.C. § 837(b) (Supp. V, 1970).

may be encouraged to assume that the difference is an area where defense counsel is fair game. In any event the extent to which Congress has defined the military judge of a general court-martial as different, and has implied that his military unorthodoxy is to be tolerated, is not equally applicable to defense counsel. It should be.

In each of the military departments there should be an Assistant Judge Advocate General for the Defense of the same rank as the Judge Advocate General. Defense counsel should be designated by the Assistant Judge Advocate General for Defense for detail by the convening authority, and neither the convening authority nor any member of his staff should prepare or review any report concerning the effectiveness, fitness, or efficiency of the counsel so detailed, which relates to his performance of duty as counsel. Defense counsel should be directly responsible to the Assistant Judge Advocate General for Defense and should perform duties other than those relating to his primary duty as defense counsel only when such duties are assigned to him by, or with the approval of, the Assistant Judge Advocate General for the Defense.⁷²

C. Increased Enlisted Participation

Of proposals to increase the participation of enlisted people in courts-martial, Professor Bishop has said, "In the cold light of military reality, it seems doubtful that the discipline and efficiency of an armed force would be promoted by requiring that a private who slugs the first sergeant be convicted by the unanimous vote of twelve other privates."⁷³

In 1946 the Doolittle Board remarked that:

A report to the Secretary of War during World War I, submitted by one of his assistants after a survey of conditions in the Army in 1919, called attention to the "bitterness engendered among the enlisted men by special privileges accorded the officer personnel (privileges that have no military significance nor value) who are in many instances mental and moral inferiors of half of their subordinates."⁷⁴

72. For a parallel suggestion, which administratively is somewhat more elaborate, see Sherman, *supra* note 70, at 100.

73. Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, § 6 (Magazine), at 40 col. 3. An enlisted member may now request that one-third of the court trying him be enlisted persons. UCMJ art. 25(C)(1), 10 U.S.C. § 825(C)(1) (1964). They turn out to be senior noncommissioned officers, who, barracks rumor has it, are not inclined to be lenient. See *United States v. Crawford*, 15 U.S.C.M.A. 31, 37, 35 C.M.R. 3, 9 (1964).

74. REPORT OF THE SECRETARY OF WAR'S BOARD ON OFFICER-ENLISTED MAN RELATIONSHIPS, S. Doc. No. 196, 79th Cong., 2d Sess. 2 (1947) [hereinafter cited as DOOLITTLE BOARD].

Whether or not the officer "class" is inferior to so many members of its subordinate "class," enlisted personnel seem better qualified by mental and medical criteria to sit on juries than is the commonality of the population. The Selective Service System rejected 39.8 percent of the 5,136,000 draftees it examined in the period 1950 to 1968. More than 15 percent failed only the mental test. In 1967, 40.7 percent were disqualified; 9.3 percent for mental reasons alone.⁷⁵

The prescient Doolittle Board, made up of two lieutenant generals, an enlisted man who ended the war as a lieutenant colonel, a sergeant paratrooper, a technical sergeant who won the Medal of Honor, and a bomber sergeant, noted that:

Social distinctions, both on and off duty, directed attention to the unnecessary indignities suffered by soldiers—indignities which had no positive effect upon discipline and military efficiency. . . . The largest differential, which brought the most criticism in every instance, was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel.⁷⁶

The board urged the "need for a new philosophy in the military order, a policy of treatment of men, especially in the 'ranks,' in terms of advanced concepts in social thinking,"⁷⁷ complained that "[t]he present system does not permit full recognition of the dignities of man,"⁷⁸ and recommended "that enlisted personnel be permitted on courts, but that every member of a court be senior to the accused."⁷⁹

I join the Doolittle Board, Professor Sherman, and others in recommending that an effective, rather than an illusory, provision for enlisted men on courts-martial be enacted by Congress. Professor Sherman wants an enlisted man or an officer to be authorized to elect to have one-half of his court-martial composed of members of his own rank.⁸⁰ This may be a bit much for Congress (and the military!) to swallow all at once.

I recommend that article 25 of the Uniform Code of Military Justice⁸¹ be amended to provide that commissioned officers, warrant officers, and enlisted members of the Armed Forces be eligible to serve on general and special courts-martial, that the array available to the convening authority for his selection be the membership of his command

75. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, No. 385, at 261 (1969).

76. DOOLITTLE BOARD, *supra* note 74, at 11-12.

77. *Id.* at 18.

78. *Id.*

79. *Id.* at 21.

80. Sherman, *supra* note 70, at 98.

81. 10 U.S.C. § 825 (1964).

subject to the Uniform Code of Military Justice, that the members of the court be drawn at random, that no member of the court be junior to the accused, and that the membership of enlisted persons on the court be limited to one-third of the total.

The suggestions made here, limited tenure for military judges, the appointment in each of the military services of an Assistant Judge Advocate General for the Defense, modest reinforcement of the independence of defense counsel, and increased participation of enlisted men in special and general courts-martial, serve a number of purposes. So do the reforms urged by Professor Sherman in his study.⁸² So do the changes now under study in the office of the Judge Advocate General of the Army which would, if adopted, place sentencing power in the hands of the military judge in noncapital cases, and provide for review by the Supreme Court of decisions of the Court of Military Appeals.⁸³

One such purpose is readily evident. As the military judicial sys-

82. Sherman, *supra* note 70. Professor Sherman's study puts into a context permitting evaluation Professor Dershowitz's statement that "I don't think any court-martial can be fair with the kind of control the military has over its men," and Professor Bishop's conclusion that "most [courts-martial] are as fair as most civilian criminal trials (for what that is worth) and their members as fair as civilian jurors (for what *that* is worth.)" Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, § 6 (Magazine), at 33, col. 1; 34, col. 3. Sherman makes the following recommendations: (a) the punitive articles proscribing conduct unbecoming an officer and a gentleman and all disorders and neglects to the prejudice of good order and discipline (UCMJ arts. 133-34, 10 U.S.C. §§ 933-34 (1964)) be abolished, with articles of greater specificity being substituted therefor, or, alternatively, that prosecution under the existing articles be severely limited; (b) the article dealing with contemptuous words against the President and other officials (UCMJ Art. 88, 10 U.S.C. § 888 (1964)), and the statute making punishable provoking speeches or gestures (UCMJ art. 117, 10 U.S.C. § 917 (1964)), be repealed; (c) jeopardy attach in a court-martial preventing a second trial for the same offense in any United States civilian court, and, correspondingly, that double jeopardy should prevent trial by a military court when the serviceman has already been prosecuted in a civilian court; (d) maximum sentences should be reduced, and a more discriminatory scale of punishments, reflective of the degree of culpability involved, be established; and (e) the abolishment of the President's power to alter or suspend the table of punishments. Sherman, *supra* note 70, at 85. Further, Professor Sherman poses far reaching recommendations which seek to eliminate or reduce the commander's influence over courts-martial. *Id.* at 86-87, 96. And finally, he encourages overhauling the structure of post-trial proceedings. *Id.* at 102-03.

83. 1969 REPORT, *supra* note 6, at 20-21. Reservations still remain about the wisdom of other recommendations under consideration by the office of the Judge Advocate General of the Army, *viz.*, broadening the contempt powers of the military judge, permitting the convening authority to order a confinement sentence into execution, and the prosecution of certain absence without leave and desertion offenses by the federal courts.

tem is improved, the potential for abuse is lessened, particularly where the consequences are as serious as a discharge other than an honorable discharge. The changes proposed would afford needed protection for those involved in the process of military justice. But further, without serious inconvenience to the military, they would quiet the fears of the Supreme Court, fears which cause the Court continually to seek to circumscribe the jurisdiction of courts-martial.⁸⁴

IV. The Administrative Process: Due or Otherwise

First of all it should be recognized that any separation of a soldier from the military prior to the normal expiration of his tour of duty is wasteful, however necessary it may be in some cases. The military department loses whatever resources it has put into his training, maintenance, and rehabilitation, and it must find another to put in his place. The process of eliminating the man, however abbreviated and rudimentary, is still cumbersome, expensive, and non-productive. Although some enlisted men and women may prefer an early discharge, even one with an unfortunate characterization attached to it, rather than a continuation of their military experience, not many so discharged can be expected to emerge from the process better able to cope with the strains of civilian life. The community, having paid for the whole affair, finds in its midst a prematurely discharged soldier with a new collection of bruises to his spirit. Nobody wins this battle.

What makes a man do well or poorly in the service is a congeries of highly complicated and perhaps sometimes unknowable factors. Among the major determinants of performance, Professor Eli Ginzberg,⁸⁵ then director of the Conservation of Human Resources Project which was established by General Eisenhower at Columbia in 1950, found the following:

- a. Compulsion. The absence in the military of that degree of freedom of choice characteristic of the civilian community;
- b. Training Reversal. Men taught to curb their aggressiveness are taught to kill;
- c. Strangeness. Men are removed from their families, jobs, and friends, and sent off to exotic and frequently uncomfortable places;
- d. Convictions. How righteous a man believes his country's cause;

84. *Id.* at 21.

85. 2 COLUMBIA UNIVERSITY, *THE INEFFECTIVE SOLDIER* 1-40 (1959). This work is the result of a study, *The Conservation of Human Resources Project*, directed by Eli Ginzberg.

- e. Personality. His physical condition, intelligence, and motivation;
- f. Family. How disruptive was the soldier's removal from his family, or the break up of that family;
- g. Group. How cohesive and how well led was the group which supplanted the soldier's family;
- h. Military Organization. How much did the military invest in the selection and training of the soldier, how well was the whole business planned, how disciplined or undisciplined was the soldier's unit;
- i. Duty Assignment. A job above or well below a soldier's physical, intellectual, or emotional capacity eventually will cause him to perform poorly;
- j. Conflict of Cultural Values. How well did the service reconcile the often competing needs of efficiency and fairness. How well (or badly) received was the deeply religious or aberrant soldier; and,
- k. Situational Stress.⁸⁶

In justifying the discharge process, the military departments emphasize that part of the selection process which causes the rejection of those who do not qualify for service. The criteria used include mental, educational, medical, and moral minimum requirements.⁸⁷ No doubt such regulations screen some men and women who, if they were permitted to enter the service, would prove to be administrative discharge respondents. But, as Professor Ginzberg notes, "As the number of men who must be screened to meet an organization's needs increases, less should be expected of the selection mechanism. Pressures of time and an inexperienced examining group, the impossibility of expanding rapidly if large numbers are rejected and the inherent limitations of selection devices to differentiate validly as to the performance potential of men with differing backgrounds underwrite this conclusion."⁸⁸ Ginzberg asks that additional resources be devoted to the development of leaders, that more attention be paid to placing men in jobs they can do, that factors which tend to weaken motivation not be perpetuated, that personnel policies be attuned to equity, and that personnel use planning be more anticipative.⁸⁹

86. *Id.*

87. *See, e.g.,* Army Reg. 601-210 (May 1, 1968).

88. 3 COLUMBIA UNIVERSITY, *THE INEFFECTIVE SOLDIER* 157 (1959).

89. *Id.* at 158-59. The Army still has trouble arranging its square pegs and round holes. A recent Department of Defense study shows that 5,722 college graduates entered the Army in 1969 with academic qualifications which would have permitted them to enter military specialties with little or no additional training. Only

The unsuitable or unfit soldier whose conduct does not warrant trial by court-martial but nonetheless identifies him as being of limited usefulness to the service needs to be looked at in a new light. If his poor performance is seen in part as the result of faulty screening, malassignment, imperceptive leadership, inadequate personnel planning, inherent weaknesses (and strengths?) over which he has no control, and somewhat less than now seems to be the case as volitional recalcitrance, a better balance can be struck between the miseries of the service and the man. If he is so viewed, perhaps our unseemly rage to brand as less than honorable can be reduced.

A. Unsuitability

As discussed before⁹⁰ a service person may be discharged with either an honorable or general discharge as warranted by his military record for unsuitability because of inaptitude, character and behavior disorders, apathy, defective attitudes, inability to expend effort constructively, enuresis, alcoholism, homosexual or other aberrant tendencies, or financial irresponsibility.⁹¹ The Department of Defense does not further define enuresis, alcoholism, homosexual or other aberrant tendencies, or financial irresponsibility, nor does the Navy. The Army admits that bedwetting may be caused by other organic or psychiatric conditions and that standing alone it seldom necessitates separation. Nonetheless the Army insists that the cause is most often the product of a character and behavior disorder.⁹² In sharp contrast to its apparently unrelenting disapproval of, say "inability to learn,"⁹³ the Army continues to display a curious tolerance of public drunkenness. It says that chronic alcoholism "should not be confused with occasional drunken episodes during which an individual commits antisocial acts."⁹⁴ Financial irresponsibility in the Army seems not to be a ground for a finding of unsuitability, but, worse, what may be the same thing shows up as a category of unfitness.⁹⁵ Only those in the Army who display homosexual tendencies, desires, or interest, but who are not overt about

4 percent were assigned to those specialties. At the same time other men without previous qualifications were trained to fill the same specialties. N.Y. Times, June 19, 1970, at 9, col. 1.

90. See text accompanying notes 22-34 *supra*.

91. Defense Dep't, 32 C.F.R. §§ 41.6(g)(1)-(7) (1970); Army Reg. 635-212, para. 6(b)(1)-(6) (July 15, 1966); Navy, 32 C.F.R. §§ 730.10(b)(1)-(7) (1970); Air Force Manual 39-12, para. 2-4(a)-(f), Sept. 1, 1966.

92. Army Reg. 635-212, para. 6(b)(5) (July 15, 1966).

93. *Id.* para. 6(b)(1).

94. *Id.* para. 6(b)(4).

95. *Id.* para. 6(a)(6).

it, may be eligible for "unsuitability,"⁹⁶ but those who do something about it may be found unfit or be court-martialed.⁹⁷

"Inaptitude" is described by the Department of Defense and the departments as "[a]pplicable to those persons who are best described as inapt due to lack of general adaptability, want of readiness of skill, unhandiness, or inability to learn."⁹⁸

All the departments agree that character and behavior disorders and disorders of intelligence, as determined by medical authority, fall within the category of unsuitability. They except combat exhaustion and other acute situational maladjustments, unless they are manifestations of more basic underlying disorders.⁹⁹

Apathy, defective attitudes, and inability to expend effort constructively are "significant observable defect[s], *apparently beyond the control of the individual*, elsewhere not readily describable," according to the Department of Defense.¹⁰⁰ The Navy and the Air Force concur.¹⁰¹ The Army finds it necessary to underline that: "The presence of a physical or mental disease or defect-producing impairment or function [insufficient to warrant separation under other regulations] is no bar to discharge for unsuitability."¹⁰²

B. Unfitness

Here on the borderline between judicial and administrative discharges the Department of Defense lists frequent involvement of a discreditable nature with civil or military authorities as constituting "unfitness." Other possibilities include sexual perversion including but not limited to lewd and lascivious acts, homosexual acts, sodomy, indecent exposure, indecent acts with or assault upon a child, or other indecent acts or offenses, drug abuse, an established pattern for shirking, an established pattern showing dishonorable failure to pay just debts, an established pattern showing dishonorable failure to contribute adequate

96. *Id.* para. 6(b)(6). The Air Force regulation is to the same effect. Air Force Manual 39-12, para. 2-4(f) (Sept. 1, 1966).

97. Army Reg. 635-89, paras. 15-16 (July 15, 1966).

98. 32 C.F.R. § 41.6(g)(1) (1970); Army Reg. 635-212, para. 6(b)(1) (July 15, 1966); Navy, 32 C.F.R. § 730.10(b)(1) (1970); Air Force Manual 39-12, para. 2-4(a) (Sept. 1, 1966).

99. Defense Dep't, 32 C.F.R. § 41.6(g)(2) (1970); Army Reg. 635-212, para. 6(b)(2) (July 15, 1966); Navy, 32 C.F.R. § 730.10(b)(5) (1970); Air Force Manual 39-12, para. 2-4(b) (Sept. 1, 1966).

100. 32 C.F.R. § 41.6(g)(3) (1970) (emphasis added).

101. Navy, 32 C.F.R. § 730.10(b)(2) (1970); Air Force Manual 39-12, para. 2-4(c) (Sept. 1, 1966).

102. Army Reg. 635-212, para. 6(b)(3) (July 15, 1966).

support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents, and unsanitary habits.¹⁰³

C. Lack of Fault

The Department of Defense and the military departments should not be permitted, nor should they permit themselves, to authorize the administrative discharge of service people with less than an honorable discharge (not general, not undesirable) for conduct bereft of fault. That a man is sick or is not endowed with adequate mental or physical strengths (inaptitude, character and behavior disorders, apathy, alcoholism, homosexuality, perversion, abuse, enuresis, unsanitary habits) should be insufficient to brand him as less deserving of an honorable discharge than his healthier or stronger brothers. A more nearly candid recognition that weaknesses are widely distributed throughout the population, and that even the strong have their limits of tolerance, may make for additional understanding of those weaknesses which the services find inconvenient.¹⁰⁴

D. Vagueness

Nor should the military departments separate their people with anything but an honorable discharge under definitions as vague, empty, cumbersome, and unwieldy as those used by the Department of Defense. Inability to learn what? Mathematics or ditch digging? Want of readiness of what skill? Small or large motor muscle control? Unhandiness? Left or right unhandiness? Character or behavior disorders? If it takes, as the regulations say, a medical authority to make this diagnosis, why brand the man?

What of apathy? A mathematician apathetic to ditch digging, or a laborer to mathematics? And what is a "defective attitude"? A dim view of the war? Over-enthusiasm for killing? Inability to expend effort constructively? A messy desk, reluctance to serve the admiral's mess,

103. 32 C.F.R. §§ 41.6(i)(1)-(7) (1970). With the exception of an expanded definition of drug abuse, the services repeat without further explanation definitions of the Department of Defense. Army Reg. 635-212, para. 6(a) (July 15, 1966); Navy, 32 C.F.R. § 730.12(b) (1970); Air Force Manual 39-12, para. 2-15 (Sept. 1, 1966).

104. Ninety-three percent of the noncommissioned officers who had been in combat for less than 4 months "had no use" for a soldier who went AWOL from the front after having been on the front line for a long period of time. However, only 26 percent of the noncoms who had been in combat for 9 months took a similar view. Smith, *Combat Motivations Among Ground Troops*, in 2 STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II, 105, 116 (1949). If grizzled noncommissioned officers recognize weakness, why should not the rest of us?

disregard of useless tasks? Frequent involvement of a discreditable nature with civil or military authorities? Too many speeding tickets, too many appeals? To whose discredit and to what extent?

It is no answer to argue that American courts are required to deal with terms of equal breadth. Courts define, have or gain experience, rely on reported decisions of their predecessors, and, when necessary, by characterizing as overly broad, return too broad statutes to the legislature. Administrative discharge boards have none of the independence of courts, receive little or no assistance in defining vague terms, have no library to tell them, for instance, what is and what is not "discreditable," sit on an ad hoc or at best temporary basis, and view their tasks as peripheral to their principal duties.

V. The Overlap with the Criminal Law

Sexual perversion, lewd and lascivious acts, some homosexual acts, sodomy, indecent exposure, indecent acts with or assault upon a child, seem matters falling well within the ambit of the punitive articles of the Uniform Code of Military Justice. Acts which fall within the code but which are not tried by a court-martial should not be permitted to furnish the foundation for a separation with either a general or undesirable discharge.

As a matter of fact, the Department of Defense expressly authorizes a general discharge when the grounds are based wholly or in part upon acts or omissions for which the service member has been previously tried by court-martial and acquitted.¹⁰⁵ Trial by court-martial may preclude an undesirable discharge after an acquittal, "except when such acquittal or equivalent disposition is based on a legal technicality not going to the merits."¹⁰⁶ Legal technicalities turn out to mean no "trial because of dismissal,"¹⁰⁷ trial "terminated due to lack of availability of witnesses or for some other reason,"¹⁰⁸ insufficient "evidence of the corpus delict [sic] to corroborate the confession,"¹⁰⁹ and trial "barred by the statute of limitations."¹¹⁰ Further, the infrequent but typical case involving child molestation is described thus:

The court has been assembled. You have started to go to

105. 32 C.F.R. § 41.4(a)(7) (1970).

106. *Id.*

107. 1966 *Hearings*, *supra* note 3, pt. 1, at 399 (testimony of General Berg, the Deputy Assistant Secretary of Defense).

108. *Id.*

109. *Id.* (testimony of General Hodson, then the Assistant Judge Advocate of the Army for Military Justice, now the Judge Advocate General).

110. *Id.* at 400.

trial in the case, and your minor witness, the child of tender years, 9, 10, 11 years old—you have been assured by the mother that the witness will be there, will be ready to testify—and you start the case, and jeopardy attaches, and all of a sudden the witness breaks down on the witness stand, gets scared, and the mother pulls her off or pulls him off.¹¹¹

Convenience of the Government, that is lack of evidence, lack of witnesses, stale trials, and compassion for witnesses (however admirable) should be no excuse for the award of a general or undesirable discharge. This is particularly true here in the twilight zone between “discipline” as imposed by court-martial and as imposed by an administrative board.

A. Hearing

The Defense Department is under the impression that whether or not a respondent is entitled to a hearing depends in part on how long he has been in the service.¹¹² If the respondent is slated for an undesirable discharge, there is no question; he may have a hearing before an administrative discharge board.¹¹³ But in the case of a general discharge the serviceman must have at least 8 years continuous active service to be entitled to a hearing.¹¹⁴ If he has less than that, he is merely notified in writing of the proposed discharge action and allowed to make a statement in his own behalf.¹¹⁵ Although the Army¹¹⁶ and the Air Force¹¹⁷ do allow hearings to all respondents, the Navy does not.¹¹⁸ It follows the Defense Department's directive requiring 8 years of active and continuous service.

B. Counsel

Respondents eligible for a hearing on either an undesirable discharge or a general discharge, says the Department of Defense, have the right to be represented by “counsel.”¹¹⁹ But “counsel,” except in the Air Force, only means a military lawyer qualified under the Uniform Code of Military Justice “unless appropriate authority certifies in the

111. *Id.* at 401. Professor Wigmore warns of the child's love of fantasy, but he abandons any hope of its measurement. 2 J. WIGMORE, EVIDENCE § 509, at 601 (3d ed. 1940).

112. *See*, 32 C.F.R. §§ 41.7(c)(1)-(2) (1970).

113. *Id.* § 41.7(d)(1)(i).

114. *Id.* § 41.7(c)(2).

115. *Id.* § 41.7(C)(1).

116. Army Reg. 635-212, para. 17(c)(2) (July 15, 1966).

117. Air Force Manual 39-12, para. 1-25(c)(4)(a) (Sept. 1, 1966) & para. 3-6(c) (change no. 1) (Nov. 30, 1967).

118. Navy, 32 C.F.R. § 730.10(f) (1970).

119. 32 C.F.R. §§ 41.7(c)(2), 41.7(d)(1)(ii) (1970).

permanent record the nonavailability of a lawyer so qualified and sets forth the qualifications of the substituted non-lawyer counsel."¹²⁰

C. Witnesses

The respondent

may request the appearance before the board of any witness whose testimony he believes to be pertinent to his case. He will specify in his request the type of information the witness can provide. The board will invite the witness to attend if it considers that the witness is reasonably available and that his testimony can add materially to the case. If a witness on active duty declines the invitation, the board may refer the matter to the convening authority for a decision or orders. However, witnesses not on active duty must appear voluntarily and at no expense to the Government.¹²¹

D. Challenges

The respondent may challenge for cause, but not preemptorily.¹²²

VI. The Army Exemplar

Tying all of this together in the back of the promulgating Army Regulations is an exemplar of the record of the proceedings of a board called to consider whether or not to discharge one Private John Doe for unfitness with an undesirable discharge. Apparently this specimen is a model of what the Department of the Army expects in a discharge proceeding; surely it was not published as an example of what not to do.

Doe, so the record recites, is 20 years old.¹²³ During the first 4 months of his enlistment when he was in basic training, Doe's conduct and efficiency were satisfactory.¹²⁴ Only after he arrived in the 4th Battle Group did his ratings fall to unsatisfactory.¹²⁵ He was shifted among three different companies, presumably in an attempt to rehabilitate him, but all three were parts of the 4th Battle Group.¹²⁶

120. Defense Dep't, 32 C.F.R. § 41.3(k) (1970); Army Reg. 635-212, para. 16 (July 15, 1966); Navy 32 C.F.R. § 730.1(a)(10) (1970). The Air Force does not permit its commanders to escape furnishing qualified counsel. Air Force Manual 39-12, paras. 1-25(b), 1-4(e) (Sept. 1, 1966).

121. Defense Dep't, 32 C.F.R. § 41.8(c)(3) (1970); Army Reg. 635-212, para. 17(c)(2)(b) (July 15, 1966); Navy, 32 C.F.R. § 730.15(e)(2) (1970); Air Force Manual 39-12, para. 3-6(c)(2) (change no. 1) (Nov. 30, 1967).

122. Defense Dep't, 32 C.F.R. § 41.8(c)(2) (1970); Army Reg. 635-212, para. 17(c)(2)(b) (July 15, 1966); Navy, 32 C.F.R. § 730.15(e)(2) (1970); Air Force Manual 39-12, para. 3-6(c)(2) (change 1) (Nov. 30, 1967).

123. Army Reg. 635-212, app., at 17 (July 15, 1966).

124. *Id.* at 19.

125. *Id.*

126. *Id.* at 18.

Doe was convicted by court-martial three times; once for AWOL for 7 days, once for *negligently* damaging United States' property, and once for 6 days AWOL and disrespect to a noncommissioned officer while in the execution of his office.¹²⁷ (This last conviction occurred only 6 days prior to the convening of Doe's administrative discharge board. Apparently at that time his conduct in the opinion of the court-martial was either thought not to, or did not, support a bad conduct discharge.) Doe's battle group commander recommended an unfitness (undesirable) discharge "because of habits and traits of character manifested by repeated commission of petty offenses and habits of shirking."¹²⁸

At Doe's hearing his first company commander spoke of the tasks at which Doe failed, as did the other witnesses, and testified that Doe developed a "bad attitude toward his job and the Army" and "became more sullen and uncooperative."¹²⁹ Sergeant Brown, a subordinate of the company commander, who supervised Doe for 12 days, told the board that Doe's "attitude and performance were bad."¹³⁰ Titus Moody, Doe's second commanding officer who "tried Doe out in just about all positions in the company [in 3 months?]," opined "that he will never make a good soldier and should be gotten rid of as soon as possible."¹³¹ Doe's burning the potatoes caused Moody's sergeant cook to conclude that, "His attitude is bad."¹³² Doe's last company commander, who gave evidence showing some attempt to get at Doe's problem, found him "a continual headache" and despaired of anyone controlling him.¹³³

Doe himself is said to have testified that he quit school after the 9th grade, was picked up by the police, enlisted, at first liked the Army, was disappointed when he didn't make private first class, concluded that it was no use, felt himself misunderstood by his officers and sergeants, and objected to always being pushed around.¹³⁴

Attached to the record is the certificate of a psychiatrist whose judgment was that Doe had "an inadequate personality." The doctor, noting that Doe could not be discharged through medical channels, and that he was sane, remarked that Doe's "social inadaptability prior to and

127. *Id.* at 20.

128. *Id.* at 18.

129. *Id.* at 25.

130. *Id.* at 26.

131. *Id.* at 26-27.

132. *Id.* at 27.

133. *Id.* at 28-29.

134. *Id.* at 29-30.

during service," his poor judgment, lack of commitment and motivation; judged that he would not adjust to further service, that additional efforts to rehabilitate Doe would be to no avail; and recommended that Doe be found unfit or unsuitable.¹³⁵

The argument of Doe's two counsel and the Government's one is not reported at all, even in summary.¹³⁶ On this slim summary of proceedings, which in the original covers only seven double-spaced pages, and the substance of which is here only modestly abbreviated, the board recommended that Doe be separated for unfitness with an "other than honorable" discharge.¹³⁷

The Government's prototypical record is silent on many matters which any board might well wish to evaluate before handing down a lifetime lasting undesirable discharge. Indeed, one wonders what the Government thinks the functions of the two counsel (one lawyer and one infantry officer) assigned to respondent¹³⁸ should be in an administrative discharge case, and in addition, how well the lawyer would fare in a hearing to determine the adequacy of his representation of Private Doe.

Private Doe was a junior high school dropout, with a criminal record, without skills, training, or a trade, and without demonstrated ability to learn. Was not the probability of his failure predictable? If so, what portion of the responsibility for his failure should be placed on the institution which accepted him in the first place? How fair is a Government or a military organization which places such a youngster in a situation where he can reasonably be expected to fail, and then characterizes his service as less than honorable when he does the expectable?

The record says nothing about the companies to which Private Doe was assigned, and nothing about the 4th Battle Group of which those companies were part. What was the status of their training? Were they confused beginners, or confident, accomplished organizations? The patience, time, and ability to deal compassionately with the poorly performing soldier increases, arguably, with the experience, competence, and morale of the organization of which he is a member. What were the court-martial and administrative discharge rates of the commands of which Doe was a member? Do those statistics show a comparatively high reliance on punishment and discharge as methods of treating

135. *Id.* at 41.

136. *Id.* at 30.

137. *Id.* at 31.

138. *Id.* at 22.

problem soldiers?

The Army record omits any consideration of the qualifications of the superiors of Doe who testified (as experts!) against him. How well educated were they? How well trained in leadership? How long had they held positions of command? What Army schools had they attended? Were they technically competent?

The Army finds it unnecessary for the board even to attempt to discover why, when Doe was such a nuisance in the 4th Battle Group, he nonetheless performed adequately in basic training. Before Doe was branded for life as undesirable should not his basic training sergeants and officers have been consulted?

The efforts the Army has its mythical 4th Battle Group make to find Doe a spot where he could perform in minimally acceptable fashion seem not likely to produce that result. His reassignments were all within the same small command where his reputation could easily follow him.

His first month in a squad went well enough. Then Doe went AWOL, and thereafter nothing he did turned out right. He left part of his ammunition behind because it was too heavy for him to carry (was it?). He was late for formation, appeared in a dirty uniform, burned the potatoes, was less than energetic about cleaning some rifles, and damaged the contents of a crate he unpacked with too much vigor. Doe's first AWOL seems to mark, in time at least, the alteration of his conduct for the worse. Lay efforts by his superiors to identify Doe's problem were futile. He "refused to say what was bothering him."¹³⁹ The first AWOL, or some time shortly thereafter before Doe became a respondent in discharge proceedings, was the moment when psychiatric evaluation might have proved helpful both to Doe and to his organization. If the Army takes a man showing "marked social inadaptability prior to . . . service,"¹⁴⁰ it should supply adequate professional help before it separates that man with a stigmatized discharge.

The psychiatrist who advised the board by certificate that Doe "will not adjust to further military service" and that "further rehabilitative efforts probably will be non-productive" did not appear before the board. How experienced, educated, and well adjusted to Army practice was he? How long was his interview with Doe? What is an "inadequate personality" anyway? The regulations do not say.

The record which the Army has prepared to guide administrative discharge boards, commanders, and those entrusted with the review of

139. *Id.* at 25.

140. *Id.* at 41.

the actions of those boards, encourages Spartan brevity, expert testimony by those who are not expert, the admission of extrajudicial statements by those who are said to be experts, and discourages the admission of highly relevant evidence. It presents a picture of justice reminiscent of the caricatures of traffic courts.

VII. Post Board Review and the Convening Authority

The Department of Defense permits the officer authorized to take final action in discharge cases to approve the board's recommendation,¹⁴¹ to change the kind of discharge recommended by the board to a more creditable one,¹⁴² to suspend the execution of the discharge,¹⁴³ or to retain the respondent in the service despite the board's recommendation.¹⁴⁴ He may set aside the findings of the board and refer the matter to a new board "if he finds legal prejudice to the substantial rights of the respondent."¹⁴⁵ But the discharge authority may also disapprove the board's advice to retain the respondent in the service and direct his separation with either an honorable or general discharge.¹⁴⁶ The Navy regulations track those of the Department of Defense,¹⁴⁷ but at least the Air Force and the Army appear not to give their officers the power to discharge when the board recommends retention.¹⁴⁸

The Army regulations do not quite match those of the Department of Defense or of the Navy. The Army's final authority may not direct discharge if a board recommends retention.¹⁴⁹ But a service person in the Army, whose first board believed he should be retained in the service, may be ordered before a new board if "substantial new evidence, fraud, or collusion is discovered, which was not known at the time of the original proceeding, despite the exercise of due diligence, and which will probably produce a result significantly less favorable for the member at a new hearing."¹⁵⁰ Similarly, a new board, convened because the first materially prejudiced a substantial right of the respondent, may obtain or be furnished additional evidence.¹⁵¹

141. 32 C.F.R. § 41.8(d)(1) (1970).

142. *Id.* § 41.8(d)(2).

143. *Id.* § 41.8(d)(4).

144. *Id.* § 41.8(d)(5).

145. *Id.* § 41.8(d)(7).

146. *Id.* § 41.8(d)(6).

147. Navy, 32 C.F.R. § 730.15(a) (1970).

148. Air Force Manual 39-12, tables 2-A-1, 2-B-1 (change no. 1) (Nov. 30, 1967).

149. Army Reg. 635-200, para. 1-13(c) (July 15, 1966).

150. *Id.* para. 1-13(b)(1).

151. *Id.* para. 1-13(d)(4).

In any adversarial proceeding between the United States and one of its citizens the resources available to the Government, whether or not they are employed, greatly outweigh those available to the individual. The imbalance is even more striking when, as in administrative discharge proceedings, the barriers between the Government's power and the respondent are lower than they are in criminal proceedings. Why under any circumstances would the officer having final authority need the power to give a general discharge to an enlisted person when a board has recommended his retention in the service? And in the Army where such a procedure is not permitted there is still lacking a civilized regard for the need for an early termination of litigation. The particular vulnerability of enlisted people, as well as the disparity of power between the respondent and the Army, should make the Army content with one board, even if at that board it failed to make its case.

VIII. Solutions

Those who would change the existing system of enlisted administrative discharges¹⁵² may travel one of three routes. (1) They may seek to improve the system by surrounding the administrative discharge respondent with a closer approximation of the rights which protect the accused in a court-martial. (2) They may attempt to forbid the services the opportunity to award administrative discharges at all, perhaps

152. The attention that Congress has given to administrative discharges has resulted in two bills. H.R. 943, 91st Cong., 1st Sess. (1969), concerns itself only with undesirable discharges. S. 1266, 91st Cong., 1st Sess. (1969), introduced by Senator Ervin, is a much more comprehensive effort to deal with the problem of administrative discharges. Many of its improvements are most welcome. Its important provisions may be summarized as follows: section 947 requires that the respondent be furnished counsel; section 945 makes anyone who has information or knowledge about the respondent which might affect his judgment ineligible for membership on a board; section 951 restricts the appointing authority's command influence; section 953 requires notification of the parents of an underage or incompetent respondent; and the senior commander's right to overrule a board and order a discharge is eliminated. Unfortunately, some of the inequities of the present system are retained and some are even expanded by this bill. Under section 963(a)(4), the commander may order a new board if he determines "that the interests of justice would be served by such action." Under section 963(b), a new board may be appointed to consider the case of a respondent whose first board recommended his retention "if the evidence before the second, or subsequent, board is [not] substantially the same as the evidence before the previous board." Separation for unsuitability with a general discharge may be awarded for "mental, physical, or psychological disabilities" under section 964(b). Unfitness still encompasses shirking, sexual perversion, failure to pay debts, drug addiction, and frequent discreditable involvement with civil or military authorities under sections 964(e)(1)-(5). For a more detailed analysis of the bills, see Lynch, *The Administrative Discharge: Changes Needed*, 22 MAINE L. REV. 141, 158 (1970).

in the belief that, because enlistments are of short duration, all the services need do is wait a bit and their problem will disappear into the civilian community. (3) Finally there are those people such as myself who, distressed by the unfairness of administrative discharges, recommend leaving the military departments with a system which is significantly less cumbersome than courts-martial but which, in exchange, eliminates the stigma of the general and undesirable discharge.

Integration with the Judicial Process

Senator Ervin has elected the first path which would make the system of administrative discharges parallel in most important respects the Uniform Code of Military Justice.¹⁵³ In a sense the Senator is proposing a greater integration of the judicial and administrative machinery. For instance, Senator Ervin's bill provides that the Court of Military Appeals shall prescribe by rule for the review of administrative discharge action with the court itself specifying the grounds upon which such review may be obtained by the respondent or by his armed force.¹⁵⁴ The Senator's road is obstructed by forceful argument and propositions of such real or apparent strength that they may impair the success of his effort.

As was noted earlier, the authority of the services to discharge administratively finds its justification in the need of the services to be rid of some of their members by methods more summary than those supplied by criminal law. The services propose, not entirely unpersuasively, that ready ways should be available to them to get free of the bedwetter, the homosexual, the unfit, the misfit, and the incompetent. They urge that the more discharges come to resemble courts-martial the more uncertain, time consuming, and expensive they become. For the end they seek, the early separation of Private Doe, discharges that are as difficult to accomplish as courts-martial are of little or no use.

Private Doe and others like him (30,000 to 40,000 a year, say the military departments)¹⁵⁵ are troublesome characters. They occupy much more than their fair share of administrative, medical, psychiatric, rehabilitative, and legal resources. They keep coming, despite the efforts of the services and the Selective Service System to screen them out in advance of enlistment, and the annual rate of administrative discharge tends to show that the services' efforts to counsel and rehabilitate are

153. See note 152 *supra*.

154. S. 1266, 91st Cong., 1st Sess. § 966(b) (1969).

155. See 1966 *Hearings*, *supra* note 3, at 1001, 1005, 1035, 1045.

frequently frustrated. Given its necessary concentration on other matters, the military or the military judiciary may never prove to be the proper agency to restore the inadequate.

Finally, the services argue, supervision of administrative discharges will place an intolerable burden on the Court of Military Appeals.¹⁵⁶ And this coupled with the other arguments will, I believe, cripple recommendations which would eliminate administrative discharges and those which would protect the respondent in much the same way the accused is now protected.

A More Realistic Proposal

The principal evil in administrative discharges is the opportunity now available to, and widely used by, the military departments to grant general and undesirable discharges. I would remove that opportunity. The Committee on Military Justice of the Association of the Bar of the City of New York, when I was one of its members, posed "the question of whether [the purpose of certain legislation] in the field of administrative discharge proceedings can be achieved only by the complete removal of the label or characterization of a discharge."¹⁵⁷ At the time, Senator Ervin agreed that the abolition of administratively awarded, derogatory characterizations of service merited study and consideration.¹⁵⁸

The time for further study is passed. The military departments should be denied the authority to award by administrative action any but an honorable discharge. The indelible brand of an undesirable or general discharge, awarded by a process which at best is uncertain and framed by regulations that exhibit little compassion and no understanding of the weak and the deprived, inflames the most sympathetic critics of the military.

156. *Id.* pt. 1, at 23.

157. *Id.* at 121. The context of its statements shows that the committee did not intend to suggest the removal of the label "Honorable" from administrative discharges.

158. *Id.* at 122.

